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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GEORGE HUMBERTO VEGA, Appellant.	2 CA-CR 2006-0404 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042641

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Michael T. O'Toole — Phoenix
Attorneys for Appellee

Creighton Cornell, P.C.
By Creighton Cornell — Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 After a second jury trial, appellant George Humberto Vega was convicted of leaving the scene of an accident, two counts of aggravated driving under the influence of an intoxicant (DUI), three counts of endangerment, and criminal damage.[1] The trial court sentenced him to concurrent, presumptive prison terms, the longest of which were 4.5-year terms for the DUI's. Finding the issues Vega raises on appeal either without merit or improperly presented on direct appeal, we affirm.

Background

¶2 "We view the evidence in the light most favorable to upholding the jury's verdict." *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In June 2003, while stopped at a stop sign, a vehicle in which the victim and her four-month-old daughter were seated was rear-ended by another vehicle. Neither victim was injured, but their car was totaled. After the collision, the adult victim saw two men and two women get out of the other car. The men jumped over a railing and ran away. The two women walked away and were not located or interviewed at the scene.

¶3 A highway patrolman observed the accident and saw a Hispanic male with dark curly hair exit the driver's side door of the rear-ending vehicle. The officer described him as wearing a white t-shirt and having a blue and white object in his hand. Shortly afterward, police located and detained Vega and the other male occupant, later identified as Robert

[1]In his first trial held in June 2005, a jury found Vega guilty of those same offenses. Later, however, the trial court granted Vega's motion to vacate the judgments of conviction based on ineffective assistance of counsel. His second jury trial occurred in September 2006.

Rosas. Although Vega's appearance matched the patrolman's description of the rear-ending vehicle's driver, Vega told the officers he had not been driving. Rosas, who had short, "buzz cut" hair, said he was the driver. He was taken to a hospital for a head injury while police administered two breath tests on Vega. The first test revealed an alcohol concentration of .131, and the second test produced a result of .135. Vega admitted that he knew his license was suspended at the time.

¶4 At trial, the primary issue was whether Vega or Rosas had been the driver. Vega did not testify. Although he sought to call Rosas as a witness, Rosas invoked his Fifth Amendment privilege against self-incrimination and did not testify. Two women who claimed to have been the passengers in the rear-ending car testified that Rosas, not Vega, had been driving. After a four-day trial, the jury found Vega guilty on all charges.

Discussion

1. Substitution of counsel

¶5 On appeal, Vega contends the trial court committed "structural error" by denying his motion to substitute his appointed counsel with retained counsel. Two weeks before trial, Vega simultaneously moved to continue the trial and to substitute counsel due to relationship problems with his appointed counsel. Because Vega's appointed counsel was ready to proceed to trial and his retained counsel expressed doubt about his ability to effectively proceed in two weeks, the court denied the motions. We will not disturb a trial court's denial of a motion to continue for the purpose of substituting counsel "absent a clear

abuse of discretion." *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983). We find no such abuse here.

¶6 A defendant who can afford to retain private counsel generally may choose an attorney of his choice to represent him. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Wrongful denial of that right results in error, "regardless of the quality of the representation he received." *Id*. at 148. A defendant's right to choose counsel, "however, is not absolute." *State v. Coghill*, 216 Ariz. 578, ¶ 40, 169 P.3d 942, 952 (App. 2007). "Trial courts retain 'wide latitude' in balancing the right to counsel of choice against the needs of the criminal justice system to fairness, court efficiency, and high ethical standards." *Id., quoting Gonzalez-Lopez*, 548 U.S. at 152.

¶7 When Vega moved to substitute counsel just two weeks before the trial date, more than three years had passed since the incident occurred.[2] Retained counsel requested a continuance of about two and a half months, but in light of the ten motions he had already filed and his statement that he "ha[d] another couple of pleadings to file," the trial court reasonably could have been concerned about further delay. Additionally, re-scheduling the trial would have been a problem for one key, out-of-state witness.

¶8 Rule 6.3(c), Ariz. R. Crim. P., permits an attorney to withdraw after a trial has been set only if the substituting attorney signs a statement that he is aware of the trial date and will be prepared for trial. That provision "emphasize[s] [the] importance in maintaining

[2]Vega was indicted in July 2004, thirteen months after the incident. After multiple continuances, the first trial was held in June 2005. And after the convictions were vacated, the second trial was set and held in September 2006.

the trial date." Ariz. R. Crim. P. 6.3(c), cmt. Here, the retained counsel stated that he was "not a hundred percent ready" and that there was "a good amount of work that still needs to be done in the case." In contrast, appointed counsel said she was ready for trial. In view of Rule 6.3(c) and the other circumstances noted above, the court did not abuse its discretion in denying the motion.[3] *See State v. West*, 168 Ariz. 292, 296-97, 812 P.2d 1110, 1114-15 (App. 1991).

2. Statements against interest

¶9 Vega also argues the trial court erred by precluding evidence of Rosas's statements against interest made "to police and family at the hospital" and his tape-recorded confession to Vega's counsel.[4] We review evidentiary rulings for an abuse of discretion. *See*

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[3]Vega also contends the trial court "erred as a matter of law" by "never address[ing] the lack of attorney-client relationship" between his appointed counsel and himself. According to his then counsel's statement at a hearing on pending motions, a week before trial, Vega apparently moved pro se for a continuance due to "ineffective assistance of counsel." The record contains no such motion. And at that hearing, Vega did not allege any wrongdoing on the part of his counsel. Instead, he merely claimed repeatedly that he was innocent and "didn't do it." Although Vega and his counsel did have a disagreement, differences that do not amount to an irreconcilable conflict do not require a new appointment. *See State v. Cromwell*, 211 Ariz. 181, ¶¶ 29-30, 119 P.3d 448, 453-54 (2005) (conflict must go beyond personality differences, "warranting the appointment of new counsel in order to avoid the clear prospect of an unfair trial"). Therefore, the court did not err by not considering his pro se motion.

[4]In the second part of his argument on this issue, Vega alleges ineffective assistance of his appointed counsel for "fail[ing] to adequately litigate the trustworthiness of Rosas'[s] three confessions." We decline to address that argument because it must be raised in a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Similarly, we do not address Vega's other arguments about alleged deficiencies in his counsel's performance, made pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). *See Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d at

State v. McCurdy, 216 Ariz. 567, ¶ 6, 169 P.3d 931, 935 (App. 2007). An out-of-court statement that "tend[s] to expose the declarant to criminal liability and [is] offered to exculpate the accused" may be admitted under an exception to the hearsay rule if three requirements are met: 1) the declarant is unavailable as a witness; 2) the statement is against the declarant's interest; and 3) "corroborating circumstances clearly indicate the trustworthiness of the statement." Ariz. R. Evid. 804(b)(3); *see also State v. Tankersley*, 191 Ariz. 359, ¶ 45, 956 P.2d 486, 497 (1998).

¶10 Before trial, Vega moved to admit statements Rosas had made to police and his mother that he was the driver of the rear-ending vehicle. He also sought to introduce the transcript of a recorded interview Vega's counsel had conducted of Rosas. The trial court found that Rosas had a Fifth Amendment right to not testify because "his statements could subject him to criminal prosecution." Although the court admitted evidence of Rosas's statements made to police shortly after the incident and near the scene as excited utterances, *see* Ariz. R. Evid. 803(2), it excluded the other statements because "there [we]re no sufficient indicators of trustworthiness." *See* Ariz. R. Evid. 804(b)(3).

¶11 Both sides agree that the pertinent issue relates to the third requirement for admission under Rule 804(b)(3), that is, whether the trial court correctly ruled that the trustworthiness of Rosas's statements was not supported by corroborating evidence. The relevant inquiry for trustworthiness is "limited to asking whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person

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to believe that the statement could be true." *State v. LaGrand*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987).

¶12 Citing *State v. Lopez*, 159 Ariz. 52, 764 P.2d 1111 (1988), Vega asserts the trial court committed "clear error" in excluding Rosas's statements. The court in *Lopez* found admissible out-of-court statements by another occupant that he, rather than the defendant, had been driving defendant's car at the time of an accident. *Id*. at 54-55, 764 P.2d at 1113-14. According to Vega, Rosas's statements could be true because Rosas admitted shortly after the accident and repeatedly thereafter that he had been the driver and "never denied driving," whereas Vega immediately and consistently denied driving.

¶13 Vega contends *Lopez* is "controlling in this case" and requires reversal. The facts in *Lopez*, however, included more corroborating evidence than was presented in this case. For example, not only did the declarant in *Lopez* admit to eight different people that he had been driving, but the record there also reflected that he often drove the defendant's car, the driver's seat was in a position consistent with his having been the driver, he had driven the vehicle earlier that night, and he had offered to pay for repairing the car after the collision. *Id*. at 55, 764 P.2d at 1114.

¶14 In contrast, the record here lacks similar corroborating evidence that Rosas was driving. Rather, Vega told police the vehicle was his and that he was buying it from his parents. In addition, Vega was driving initially when he picked up Rosas from his house before the accident. As the trial court aptly noted, the patrolman was "a neutral observer" whose testimony completely undermined the reliability of Rosas's statements. That officer

testified he had seen a man with dark curly hair get out of the driver's side of the rear-ending vehicle. At the time of the accident, Vega had "dark, wavy or curly hair," whereas Rosas had a short, buzz hair cut. Additionally, the windshield had a "spider web indentation" on the passenger side, and Rosas was taken to the hospital for a head injury after the accident. The trial court further noted that because the men had known each other since seventh grade, Rosas had a "motive to try to cover for his friend who was facing probably more serious charges than Mr. Rosas would face." These facts fairly differentiate this case from *Lopez*.

¶15 Nonetheless, Vega contends the trial court applied an incorrect legal analysis by "subjectively" evaluating the evidence and refusing to consider those witnesses "who [had] heard Rosas'[s] several dozen confessions." But we disagree with Vega's description of the trial court's analysis. Rather, the court's ruling was based on an assessment of objective facts in the record, primarily the officer's eyewitness testimony. In accordance with Rule 804(b)(3), the court also noted that the focus of its inquiry was on whether Rosas's statements were trustworthy.

¶16 As corroborating evidence, Vega points to the testimony of the two women that Rosas was driving the car in which they claimed to have been passengers; the lack of any physical evidence found to link either man to the driver's side of the car; and his alternative theory of how Rosas was injured. As the court in *LaGrand* emphasized, however, when both corroborating and contradicting evidence exists, the trial court must determine whether a reasonable person could find true the out-of-court statements tending

to inculpate the declarant and exculpate the defendant. *LaGrand*, 153 Ariz. at 28, 734 P.2d at 570. Under the circumstances here, we cannot say the court abused its discretion by concluding that the evidence did not "*clearly* indicate the trustworthiness of the statement[s]" Vega sought to introduce. Ariz. R. Evid. 804(b)(3) (emphasis added); s*ee also Tankersley*, 191 Ariz. 359, ¶ 47, 956 P.2d at 497-98; *LaGrand*, 153 Ariz. at 29, 734 P.2d at 571.

3. Immunity

¶17 Vega also maintains that "[i]t was constitutional error" to allow Rosas to invoke the Fifth Amendment privilege against self-incrimination rather than granting him immunity to testify. Vega claims both the trial court and his appointed counsel mistakenly "believed that only prosecutors can grant use immunity to a witness." Vega did not raise the issue of immunity before or during trial.[5] Therefore, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Vega bears the burden of demonstrating that error occurred, that it was fundamental, and that it prejudiced him. *See id*. ¶¶ 19-20, 23. Vega fails to meet that burden here.

¶18 It is within the state's sole discretion to grant immunity to witnesses. *See State v. Doody*, 187 Ariz. 363, 376, 930 P.2d 440, 453 (App. 1996). A trial court generally does

[5]Vega asserts in his reply brief that he raised immunity in his motion to vacate the judgment after the second trial. But in that motion, he stated that "[t]rial counsel did not adequately litigate her belief that Rosas no longer has a Fifth Amendment right against self-incrimination." Immunity was not raised. And, in any event, a defendant does not preserve an issue for review by first raising it after trial.

not have the authority to grant immunity. *See State v. Kasten*, 170 Ariz. 224, 228, 823 P.2d 91, 95 (App. 1991). But even if it did, Vega did not request immunity for Rosas and, therefore, the trial court could not have granted immunity sua sponte. *See State v. Jones*, 197 Ariz. 290, ¶ 22, 4 P.3d 345, 357 (2000). Additionally, "[a] defendant's desire that a witness testify does not override the witness' fifth amendment right to claim the privilege against self-incrimination." *State v. Fisher*, 141 Ariz. 227, 243, 686 P.2d 750, 766 (1984).

¶19 Citing *State v. Axley*, 132 Ariz. 383, 385, 646 P.2d 268, 270 (1982), Vega contends one of the "longstanding exceptions" applies to his case because the prosecutor committed misconduct, had no strong interest in declining to grant immunity to Rosas, and unfairly withheld it. He claims the state "took every step imaginable, and then some, to maximize the chance that Rosas would not testify." The record, however, does not support his assertion. The state sought counsel for Rosas and informed Rosas of the possible consequences of his proffered testimony. He was represented by independent counsel and decided voluntarily to invoke his Fifth Amendment right. The prosecutor did not commit misconduct by informing Rosas of the potential effects of his testimony. *See Jones*, 197 Ariz. 290, ¶ 21, 4 P.3d at 356-57. Nor has Vega shown any substantial interference by the state. *See id.* And, as noted above, Vega did not even request immunity for Rosas. Therefore, Vega has not shown any error, fundamental or otherwise.

4. Invocation of Rosas's Fifth Amendment privilege

¶20 Next, Vega contends the trial court fundamentally erred by allowing Rosas to invoke the Fifth Amendment several weeks before trial when Rosas was not personally

present. At a pre-trial hearing, Vega challenged whether Rosas had a Fifth Amendment right because, Vega alleged, it was unlikely that Rosas could be prosecuted. Although Rosas was not present at that hearing, his counsel was and confirmed that "Rosas [had] expressed he will take the Fifth Amendment again." Vega neither objected based on Rosas's absence from the hearing nor suggested that the trial court could not rule until after personally consulting with Rosas. Therefore, we review this new issue for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. No error occurred here.

¶21 After Vega's first trial, the trial court "examined and questioned" Rosas, concluding that he "knowingly, voluntarily, and intelligently" invoked his right to remain silent. The same judge presided over the second trial and, at the pretrial hearing discussed above, again found that Rosas had a Fifth Amendment right to remain silent because "his statements could subject him to criminal prosecution if the State chose to follow-up [sic] on it." When, as here, the court has extensive knowledge of the facts and circumstances surrounding the witness's proffered testimony, it does not need to personally question the witness. *See State v. Rosas-Hernandez*, 202 Ariz. 212, ¶¶ 17-20, 42 P.3d 1177, 1182-83 (App. 2002); *State v. Mills*, 196 Ariz. 269, ¶ 31, 995 P.2d 705, 712 (App. 1999).[6]

[6]*See also State v. Maldonado*, 181 Ariz. 208, 211, 889 P.2d 1, 4 (App. 1994) (no error when trial court allowed witness to invoke Fifth Amendment privilege after speaking with counsel but without personally questioning witness); *People v. Apodaca*, 21 Cal. Rptr. 2d 14, 20 (App. 1993) (if lawyer acting under client's authority invokes the privilege, "there is little point or sense in insisting that the client also personally invoke the privilege"); *Palmer v. State*, 920 P.2d 112, 114 (Nev. 1996) (witness may invoke privilege through his counsel); *State v. Wilson*, 918 P.2d 826, 834 n.8 (Or. 1996) (same).

Additionally, Rosas was represented by counsel at the hearing, who spoke for him and invoked his right to remain silent. Therefore, we find no error.

5. Prosecutorial misconduct

¶22 Last, Vega maintains the trial court improperly denied his motion to vacate the convictions based on prosecutorial misconduct. We review a trial court's decision to deny a motion to vacate judgment for an abuse of discretion. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 90, 25 P.3d 717, 743 (2001). Vega asserts the prosecutor failed to disclose the "jail property sheet" that described his hat as black, contrary to testimony at trial that it was blue and white. He also contends "[t]he prosecution presented erroneous/false evidence that Rosas'[s] head injury resulted from hitting the passenger side windshield." The state responds, and we agree, that his claims were untimely. Therefore, we do not address them on the merits.

¶23 Rule 24.2, Ariz. R. Crim. P., provides that a motion to vacate judgment be "made no later than 60 days after the entry of judgment and sentence." Vega filed a motion to vacate within sixty days, raising claims of ineffective assistance of counsel. The motion, however, did not include any claims of prosecutorial misconduct. In his motion he did discuss the hat and evidence of Rosas's head injury, but only in relation to his counsel's failure to investigate and properly impeach the officer's testimony. Three months later, Vega filed a "supplemental motion to vacate judgment," in which he raised his claims of prosecutorial misconduct; but that motion was filed five months after his sentencing.

¶24 In his reply brief, Vega argues that the state "never objected in writing as to untimeliness" and that the trial "court never found the supplement untimely." But the state did object at the hearing on Vega's Rule 24.2 motion and moved, both in writing and orally, to strike the supplement as untimely. "[W]e are obliged to uphold the trial court's ruling if legally correct for any reason." *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002). Absent any request or order for extending the time for insertion of new issues and claims in Vega's pending Rule 24.2 motion, his supplement, filed five months after his sentencing, was untimely. *See* Ariz. R. Crim. P. 24.2 and cmt. The trial court did not abuse its discretion in denying the motion to vacate, including the new claims belatedly asserted in the supplement hereto.

Disposition

¶25 Vega's convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge